FILED
SEP 7 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 439

CHIN BICK WAH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 28, 1957.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 630) has not as yet been officially reported. The opinion of the Court of Appeals and the judgment of the Court (R. 638) also printed in Appendix A, *infra*, pp. i-xi.

JURISDICTION.

The judgment of the United States Court of Appeals was dated May 28, 1957 and was entered on that date. (R. 639.) Petition for rehearing was denied on August 9, 1957. (R. 639.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Can a conviction for making false statements in an application for an immigration visa stand where:

(1) The indictment charges in one count that petitioner made three separate false statements in the application;

(2) The jury was not instructed that to convict it must find all three of the statements to have been false; and

(3) The Court of Appeals finds that there is a failure of proof as to one of the charged statements and possibly as to a second charged state-

ment but affirms the conviction on a finding that there was evidence from which the jury could infer that the third charged statement was false?

2. Can a conviction of petitioner of conspiracy stand under a count of indictment which may be construed as charging two conspiracies, one of which does not join petitioner as a defendant?

3. Can a conviction of petitioner of conspiracy stand where the trial Court admits into evidence a *series* of post conspiracy declarations of un-indicted co-conspirators and post conspiracy declarations of a co-defendant, all made outside petitioner's presence, without limiting such declarations at the time of admission to the declarants?

4. Can a conviction stand where:

(1) Evidence is admitted subject to a motion to strike of acts of a co-defendant and an un-indicted co-conspirator in securing the illegal admission of the co-conspirator into the United States eleven years prior to the time of the conspiracy charged against petitioner;

(2) Petitioner is never connected with such acts; and,

(3) Petitioner's motion to strike such evidence as to her is denied?

STATUTES INVOLVED.

1. 18 *U.S.C.* 1546 (1948): "Whoever knowingly makes under oath any false statement in any applica-

tion, affidavit, or other document required by the immigration laws or regulations prescribed thereunder—shall be fined not more than $2,000, or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 771."

2. 18 *U.S.C.* 371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 701."

3/ The provisions of the statutes setting forth the substantive offenses which petitioner is charged with conspiring to commit: 8 *U.S.C.* 1324; 8 *U.S.C.* 1325; 18 *U.S.C.* 1001; and 18 *U.S.C.* 1542 are printed in Appendix B, *infra*, pp. xii-xiv.

STATEMENT OF THE CASE.

Petitioner stands convicted in the United States District Court for the Northern District of California of two offenses:

1. Conspiracy to defraud the United States concerning the administration of the immigration and nationality laws and to commit the substantive offenses denounced by the following statutes: 8 *U.S.C.* 1324; 8 *U.S.C.* 1325; 18 *U.S.C.* 1001; 18 *U.S.C.* 1542; and 18 *U.S.C.* 1546; and

2. The substantive offense of knowingly making under oath false statements in an application for an immigration visa in violation of 18 *U.S.C.* 1546.

The conspiracy count of the indictment charged petitioner and two co-defendants, William Fong and Robert Levy, with conspiring with six un-indicted co-conspirators to effect petitioner's illegal entry into the United States as the wife of Jonathan Yee, one of the un-indicted co-conspirators.

The substantive count charged petitioner with knowingly making under oath on March 5, 1952, at Hong Kong, in her application for an immigration visa, the following false statements:

1. She was married to Jonathan K. Yee;

2. Her passage was paid for by her husband Jonathan K. Yee;

3. She intended to join her husband Jonathan K. Yee in the United States.

Petitioner married Jonathan Yee in Hong Kong on November 29, 1951. She filed her application for an immigration visa to the United States on March 5, 1952 and at that time made the representations which are the basis of the substantive count.

The indictment charged that petitioner's marriage in Hong Kong was a sham ceremony undertaken as part of a conspiracy to secure petitioner's entry into the United States so that she might become defendant Fong's Number 2 wife. (R. 6-8.)

There is evidence in the record which supports this charge. There are, however, many factors which

would support the inference that any plan or agreement between Jonathan Yee and defendant Fong did not embrace petitioner as a party and that she married Jonathan Yee in good faith in Hong Kong, and made every effort in the United States to make the marriage a lasting success. Some of these considerations are noted by the Court of Appeals in discussing the evidence consistent with petitioner's innocence. There is much more evidence consistent with petitioner's innocence in the record not noted by the Court of Appeals. The result, however, is a conflict in the evidence which is significant because of the serious errors of law which are the basis of this petition.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari sought by this petition should be granted for the reasons (1) that the Court of Appeals' decision on both the substantive count and the conspiracy count is in conflict with applicable decisions of the Supreme Court, and (2) that the affirmance of the conspiracy count sanctions an extension of the "already pervasive and wide-sweeping nets of conspiracy prosecutions" recently denounced by the Supreme Court in *Grunewald v. United States*, 1 L. Ed. (2d) 931, 353 U.S. 391, 77 S.Ct. 963.

I.

FAILURE OF PROOF OF ANY OF THE REPRESENTATIONS CHARGED IN THE SUBSTANTIVE COUNT REQUIRES REVERSAL.

The Court of Appeals in its opinion notes that there was a failure of proof that petitioner knew that Jonathan Yee did not pay for her ticket from Hong Kong to San Francisco. The Court further indicated doubt about the falsity of the statement that petitioner was married to Yee. However, the Court finds the conviction supportable on the representation that she intended to "join" Yee in the United States.

This holding is in conflict with that of the Supreme Court in *Warszower v. United States,* 312 U.S. 344, 85 L.Ed. 876, 61 S.Ct. 481; *Grunewald v. United States,* 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. (2d) 931, 949; and *Yates v. United States,* 354 U.S. 298, 1 L.Ed. (2d) 1356, 77 S. Ct. 1064.

In *Warszower v. United States, supra,* the Supreme Court noted:

> "The prosecution had the burden of proving that the passport was obtained by the use of false statements. As the trial court instructed the jury, it might convict if any one of the statements charged in the indictment to be false was found false, *it is necessary before affirmance to decide whether there was adequate evidence to support the charge of falsity as to each of the statements.*" (Emphasis added.)

In the instant case the trial Court gave no instruction whatsoever as to whether the jury might convict on a finding that one or all of the representations were

knowingly false when made by petitioner. To support the conviction on this count, it must be held that the jury found that all three of the representations were so made by petitioner.

In this respect the instant case is akin to that of *Yates v. United States, supra,* where the Supreme Court stated:

> "The Government contends that even if the trial court was mistaken in its construction of the statute, the error was harmless because the conspiracy charge embraced both 'advocacy' of violent overthrow and 'organizing' the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives. Hence, the argument is, the jury must in any event be taken to have found petitioners guilty of conspiring to advocate, and the convictions are supportable on that basis alone. We cannot accept that proposition for a number of reasons. The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement extended to both 'advocacy' and 'organizing' in order to convict . . . In these circumstances, we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which the jury selected."

II.

COUNT ONE OF THE INDICTMENT CHARGING THE CONSPIRACY IS FATALLY DEFECTIVE AS IT MAY BE CONSTRUED AS CHARGING TWO CONSPIRACIES, ONE OF WHICH DOES NOT JOIN PETITIONER AS A DEFENDANT.

The skeleton of the indictment is in the following form:

> "First Count: (18 U.S.C. 371)
>
> The Grand Jury charges that:
>
> 1. Commencing on or about January 1, 1950 and continuously thereafter up to and including the date of the return of the indictment . . . William Fong, . . . Chin Bick Wah . . . and Robert Leonard Levy did . . . conspire . . . and agree with each other [and others] . . .,
>
> (A) To commit offenses against the United States . . . and
>
> (B) To defraud the United States . . .
>
> 2. In the year 1939 Fong Wy Sum and his mother Fong Yee Shee conspired and agreed with Jonathan K. Yee, a Chinese alien, to assist him in effecting an illegal entry into the United States by purchasing for Jonathan K. Yee a fictitious identity as a derivative citizen of the United States. In consideration thereof Jonathan K. Yee agreed to pay to Fong Wy Sum the amount of $2,000.00 for the purchase of the fictitious identity and the expenses of passage to the United States. Pursuant to the agreement Jonathan K. Yee entered the United States on December 24, 1939, under the fictitious identity of Yee Yuen Foon, and in the years thereafter paid Fong Wy Sum amounts in excess of $2,000.00, as demanded by Fong Wy Sum." (R. 3-6.)

Petitioner was named neither as a co-defendant nor co-conspirator in the latter conspiracy. Although the case was submitted to the jury on the premise that the indictment charged only one conspiracy the first count of the indictment, with the exception of the overt acts, was read in its entirety to the jury and the jury was given the indictment itself upon retiring. (R. 559-565, 591.)

Furthermore the transcript of the record of the trial is replete with evidence relating to the conspiracy charged against Fong, his mother and Jonathan Yee to effect his illegal entry and petitioner's alleged knowledge of this conspiracy.

Any conviction of petitioner as a party to the latter conspiracy would obviously be a miscarriage of justice. Yet in the face of the record presented by the prosecution, it is impossible to now determine what theory of the case was adopted by the jury. Under this posture of the case, the judgment should be reversed.

Yates v. U. S., 354 U.S. 298, 1 L.Ed. (2d) 1356, 77 S.Ct. 1064;

Grunewald v. U. S., 353 U.S. 391, 1 L.Ed. (2d) 931, 77 S.Ct. 963.

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE TESTIMONY OF DECLARATIONS OF ALLEGED CO-CONSPIRATORS AFTER THE TERMINATION OF THE CONSPIRACY.

The trial Court in this case admitted into evidence a series of declarations and statements of co-conspirators made outside the presence of petitioner in the last part of 1955 and in April of 1956, just 4 or 5 days prior to the return of the indictment. The declarations were all made in the course of efforts to discourage disclosure of the past events to Government investigators or the grand jury.

The occasions on which such post-conspiracy declarations of alleged co-conspirators outside appellant's presence were admitted were as follows:

1. Jean Yee, an admitted co-conspirator, testified concerning declarations of alleged co-conspirator Fong Yee Shee made around Christmas of 1955. (R. 442.)

2. Jean Yee testified concerning a telephone conversation with alleged co-conspirator Ruby Yee on April 4, 1956. (R. 443.)

3. Jean Yee testified concerning a meeting on the afternoon of April 4, 1956 with defendant Fong and alleged co-conspirator Fong Yee Shee and the declarations of each. (R. 445.)

4. Jean Yee testified concerning a telephone conversation on April 5, 1956 with defendant Fong and alleged co-conspirator Fong Yee Shee. (R. 453-454.)

5. Jean Yee testified concerning a telephone conversation with alleged co-conspirator Fong Yee Shee on April 6, 1956. (R. 454.)

6. Francis Leo, a Government interpreter, testified concerning the meeting on April 4, 1956 between Jean Yee, defendant Fong and Fong Yee Shee and the declarations of each. (R. 519-529.)

7. E. T. Prather, a Government agent, testified concerning the meeting on April 4, 1956 between Jean Yee, defendant Fong and Fong Yee Shee and the declarations of each. (R. 532-538.)

8. Jonathan Yee testified concerning the declarations of alleged co-conspirator Fong Yee Shee on April 5, 1956. (R. 112.)

9. Jonathan Yee testified concerning declarations of alleged co-conspirator Fong Yee Shee on April 6, 1956. (R. 116-117.)

The limitation on the admissibility of statements and declarations of co-conspirators outside the presence of defendants and after the termination of the conspiracy is well-established.

Krulewitch v. United States, 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716;

Lutwak v. United States, 344 U.S. 604, 97 L. Ed. 593, 73 S.Ct. 481.

The Government, however, in this case claimed throughout the trial that evidence of statements of alleged co-conspirators up until the return of the indictment was admissible against all defendants as acts and declarations in furtherance of the conspiracy on the ground that a conspiracy to conceal was expressly alleged as one of the crimes charged in count 1 of the indictment together with the specification of

an overt act of concealment in furtherance of the conspiracy, relying upon *Lew Moy v. United States,* 237 F. 50, 52, and *Lutwak v. United States,* 344 U.S. 604, 93 L.Ed. 790, 69 S.Ct. 716.

Grunewald v. United States, 353 U.S. 391, 1 L.Ed. (2d) 931, 77 S.Ct. 963, finally laid to rest the contention upon which the Government claimed the evidence was admissible under *Lutwak v. United States, supra.* Insofar as *Lew Moy v. United States, supra,* might be regarded as establishing a different rule in conspiracies to effect the illegal entry of aliens into the United States (see *Krulewitch v. United States,* 336 U.S. 440, 442, citing "Cf. *Lew Moy v. United States,* 237 F. 50"), it is submitted that reason does not support such a distinction and that it should be expressly disapproved in the light of the *Grunewald* case.

Under the ruling of the *Krulewitch* case, reaffirmed by the Supreme Court in *Grunewald v. United States, supra,* it was prejudicial error to admit under any circumstances evidence of declarations made outside petitioner's presence after the termination of the conspiracy *by co-conspirators not charged as defendants.* The admission of the declarations of Fong Yee Shee and Ruby Yee (1), (2), (5), (8), and (9) previously specified, is directly contrary to these decisions.

The rule for the admission in a conspiracy case of declarations of *co-defendants* after the termination of the conspiracy is clearly set forth in *Lutwak v. United States,* 344 U.S. 604, 617-619, and *Paoli v. United States,* 352 U.S. 232, 1 L.Ed. (2d) 278, 284. It is

the mandate of these cases that such declarations "must be carefully and clearly limited by the court at the time of their admission."

This rule was violated in the instant case.

The testimony of Jean Yee concerning the meeting on April 4, 1956 with defendant Fong and Fong Yee Shee and the declarations made embraced practically every facet of the alleged conspiracy. Her account of the statements and declarations made extends through pages 446-452 of the record. There can be no question but that the testimony was highly incriminating not only as to the persons present but petitioner also.

This highly prejudicial testimony was admitted to the jury without a limiting instruction of any kind. After co-defendant Levy had interposed an objection to the admission of this testimony the record shows the following occurred:

> "Mr. Schnake (Government Counsel). Your Honor, we have the memorandum of law which we finished this morning.
>
> The Court. It is too late to give it to me now, counsel. The objection may be overruled. I don't want to see it. I should have had it before.
>
> Mr. Schnake. We were just able to finish it a few minutes ago, your Honor, and I would like to file it at this time relating to some other matter that will come up.
>
> The Court. The objection is overruled." (R. 445.)

Careful examination of the record discloses that at no juncture of the proceedings did the trial Court

observe the mandate of the Supreme Court in the *Lutwak* and *Paoli* cases that such declarations "must be carefully and clearly limited by the Court at the time of their admission" to avoid prejudicial error. In the course of passing on the admissibility of the post-conspiracy declarations heretofore enumerated, the Court made three classes of rulings:

(1) The objections were summarily overruled and the declarations admitted without limitation of any kind. (R. 442, 445 and 454.)

(2) The objections were overruled but the admission of the evidence limited "solely for the purpose of proving, if it does prove, the existence of a conspiracy." (R. 444, 453.)

(3) The objections were overruled but the admission of the evidence limited to a declaration of the person making it except for such weight as it may have to prove the existence of the conspiracy. (R. 518, 531, 113-114, 116.)

The error in this case was not of the admission of a single post conspiracy declaration of a defendant as in the *Lutwak* case. The error in this case extended to a series of such post conspiracy declarations, and some merely by co-conspirators not joined as defendants. The post conspiracy declarations of defendant Fong and co-conspirators Fong Yee Shee and Jean Yee were the subject of testimony not once but three times. Jean Yee's account appears on pages 446-452 of the record. Francis Leo, an interpreter for the Immigration Service, testified from notes made by him at the time of both the English and Chinese

portions of the declarations. (R. 519-539.) Agent Prather testified as to the portions of the declarations in English from notes made by him at the time. (R. 532-538.)

The Government's conduct in urging this evidence as admissible against petitioner and the Court's rulings admitting it without clearly limiting it against the declarants clearly transgresses the rulings of *Krulewitch, Lutwak,* and *Grunewald* and represents an extension of the conspiracy practices denounced by those cases.

IV.

THE COURT COMMITTED ERROR IN DENYING PETITIONER'S MOTION TO STRIKE.

Much of the testimony in the case related to the acts of defendant Fong in arranging for and accomplishing the illegal entry of Jonathan Yee into the United States in 1939 through a "paper" father. Petitioner made a motion to strike all evidence admitted of any incidents prior to the time of the conspiracy charged, January 1, 1950, on the specific ground of its prejudicial nature because charging a prior offense and that it did not tend to prove the subsequent formation of the conspiracy. Although the Court had expressly admitted this evidence subject to a motion to strike (R. 27) and the record is totally devoid of any evidence connecting petitioner with the conspiracy in 1939 to effect Yee's illegal entry or in the events which intervened from this date and the time of the com-

mencement of the conspiracy charged against petitioner, January 1, 1950, the Court denied petitioner's motion to strike this evidence as to her. (R. 548.)

CONCLUSION.

Although the Court of Appeals in its opinion chose to rest its affirmance of petitioner's conviction primarily upon a discussion of the sufficiency of the evidence on the substantive count, the essence of this case is the conspiracy charge. Without this charge there would have been little basis for the admission of the mass of alleged acts, statements and declarations. The indictment named six persons as un-indicted co-conspirators. The purpose of such joinder, as is apparent from the record, was to lay a foundation for parading before the jury statements and declarations made by them outside petitioner's presence as statements of co-conspirators—whether in furtherance of the conspiracy or merely in furtherance of efforts to conceal evidence of the original conspiracy charged.

The instant case is a prime example of the "drift in the federal law of conspiracy" against which His Honor Associate Justice Jackson cautioned in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 93 L. ed. 790, 69 S.Ct. 716. The importance of the considerations of policy underlying this caution was recently reaffirmed by the Supreme Court in *Grunewald v. United States*, 353 U.S. 391, 1 L. Ed. (2d) 931, 940, 77 S.Ct. 963.

It is not only because of the conflict between the decision of the Court of Appeals with decisions of the Supreme Court but also because of the sanction of "loose practice," implicit in the affirmance of the conviction of petitioner on the conspiracy count, that we respectfully submit this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
September 5, 1957.

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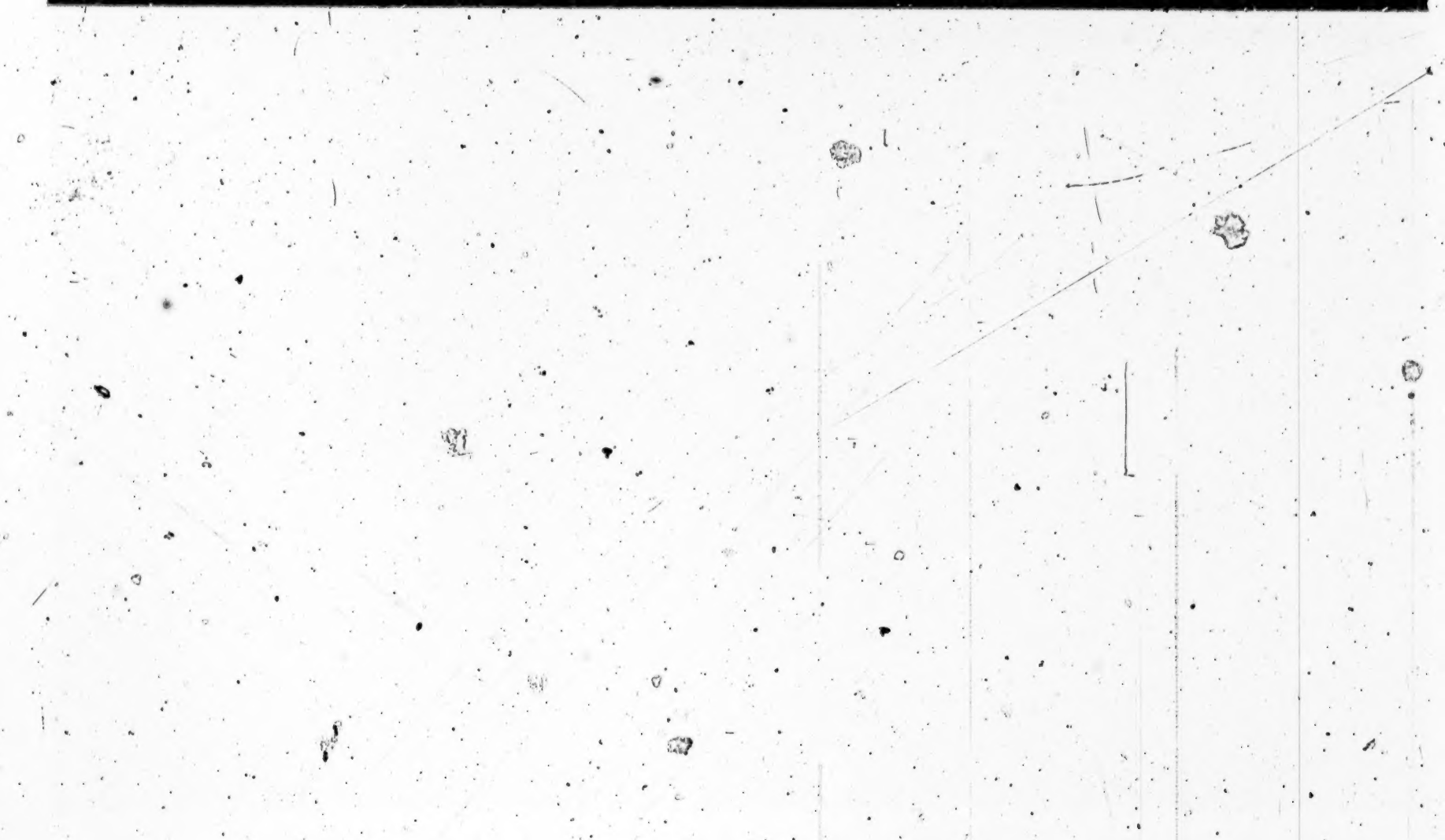
(Appendices A and B Follow.)



Appendix A

United States Court of Appeals
for the Ninth Circuit

CHIN BICK WAH, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,268 May 28, 1957

On Appeal from the United States District Court
for the Northern District of California,
Southern Division

Before: STEPHENS, CHAMBERS and BARNES, Circuit Judges

CHAMBERS, Circuit Judge:

This case deals with how a citizen of China, the appellant Chin Bick Wah, now also known as Helen Fong, made her way (or was brought) into the United States in 1952 from Hong Kong. Her age is now about 38.

She stands convicted of a conspiracy count involving the immigration laws. Also, she was convicted on a substantive count, the sixth in the indictment. In the latter count, the charge of the indictment is that on March 5, 1952, at Hong Kong she made false state-

ments in her written application[1] for the immigration visa and alien registration in that she stated:

1. She was married to Jonathan K. Yee;
2. Her passage was paid for by her husband Jonathan K. Yee;
3. She intended to join her husband Jonathan K. Yee in the United States.

A concurrent sentence of one year's imprisonment on each count was imposed.

On this appeal, with identical sentences, we need not examine both convictions, if we find one free from reversible error. Goldbaum v. United States, 9 Cir., 202 F. 2d 674. We are satisfied from examining it that defendant's conviction on the conspiracy count was wholly proper and withstands appellant's claim of error. However, the substantive count conviction is the one we choose to discuss.

Now for some facts. Fong Wy Sum,[2] herein William Fong, operates a milk store in San Francisco's Chinatown. He is a merchant of some consequence there. William is now about 49 years old. Jonathan Yee, now approximately 35 years old, who gained

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[1]Sec 18 U.S.C.A. § 1546.

[2]William Fong and another were jointly charged with Chin Bick Wah in the Conspiracy or first count of the indictment. Then he alone was charged with substantive counts numbered two, three, four and five. Count six, the substantive count on Chin Bick Wah, concerned her alone. At the conclusion of the trial and before the jury retired to deliberate, William Fong entered a plea of guilty. The third defendant under count one, a San Francisco lawyer, was ultimately exonerated by the trial judge after the jury failed to agree on the lawyer's guilt.

admission to the United States in 1939, testified that he is actually a first cousin of William Fong: that Fong in 1939 helped him (Jonathan) get into the United States under a false name and with false papers.[3] The district attorney would draw the inference in the events with which we are here concerned that Yee was subject to blackmail and had to pursue about any motion that William dictated. Jonathan served in the army of the United States from May, 1944, until sometime in 1946. Generally, after returning to San Francisco from the army, and until 1952 at least, he worked for Fong in the milk business.

Possibly, economy of words can be achieved here by now setting up a marriage and divorce chronology of William Fong and Jonathan Yee:

——————, 1924,	William Fong marries Gee Kee Yip in China. She is brought to the United States in 1932 with one child, a daughter, born to this marriage prior to 1932.
September 8, 1947,	Jonathan Yee at Reno, Nevada, marries Jean Jow. She is an American born Chinese.
May 11, 1951,	Jonathan Yee at Reno divorces Jean Jow. Divorce decree provides for custody and support of three year old daughter Joanne.

[3] Apparently Jonathan entered as a "derivative" citizen under RS Sec. 1993, 34 Stat. 1229. A "paper father" who resided in the United States and was a citizen was conveniently supplied him.

November 29, 1951,	Jonathan Yee marries Chin Bick Wah (later called Helen) in Hong Kong.
May 31, 1952,	Jonathan Yee and Chin Bick Wah remarry at Reno.
October 24, 1952,	William Fong at Reno divorces Gee Kee Yip, his wife of 28 years.
July 28, 1953,	Chin Bick Wah (Helen) divorces Jonathan Yee at Reno.
October 1, 1953,	William Fong marries Chin Bick Wah (Helen) in San Francisco.
———, 1955,	Jonathan Yee, remarries his first wife, Jean Jow, a second child (a son) having been born to Jonathan and Jean on June 2, 1952, a date on which Jonathan was married to Helen.

We think it a fair assumption to state that resentment against William Fong and Chin Bick Wah by Jean Jow Yee and her sister, May Jow, and Fong's daughter Vivian probably enabled the government agents to get their case against William Fong and Chin Bick Wah started. The feet of these three women apparently were fixed firmly on the United States soil beyond chance of dislodgment.

Under the sixth count, the one against her alone, there was a failure of proof that Chin Bick Wah (henceforth usually referred to as Helen) knew that Jonathan Yee did not pay for her ticket from Hong Kong to San Francisco. On the second prong of the

sixth count, is was charged the statement of Helen was false when she swore she was married to Jonathan Yee. That involves some difficult law. Does a party (assuming belief by the fact trier) who has participated in a sham marriage (lacking an intent to really marry) make a false statement when she says she is married? We shall lay this second prong to one side.[4]

---

[4]Rather comprehensive instructions were given the jury on the subject of conspiracy, such being the meat of the first count. On the sixth count, Helen's alleged false statements, the instructions were brief and particularized only as follows:

"In the sixth count of this indictment the defendant Chin Bick Wah is charged with the offense of knowingly and wilfully making a false statement in an application for an Immigration visa and alien registration in violation of Section 1546 of Title 18, United States Code, the pertinent portions of which provide as follows:

'Whoever knowingly makes under oath any false statement with respect to a material fact in an application * * * required by the immigration laws or regulations prescribed thereunder * * * shall be guilty of a public offense.'

"In connection with the charge contained in the sixth count of the indictment against Chin Bick Wah whose conduct is alleged to have taken place at Hong Kong, the United States Code provides as follows:

'The trial of all offenses begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found or into which he is first brought.'"

Apparently, the instruction was agreeable to the appellant here. No request was made that the jury be instructed there was a failure of proof on one or two of the representations listed in the sixth count. And there was adequate evidence, we hold, of the falsity on the representation by Chin Bick Wah that she intended to join her husband in the United States.

The possible objection that count six charged three offenses was never made by Chin Bick Wah. It is too late now. And, probably she was well advised not to make it. Such action could have resulted in three counts instead of one. See Arena v. United States, 9 Cir., 226 F.2d 227.

Thus, we come to the third accused statement in the second count: that Helen at Hong Kong on March 5, 1952, in her application to the vice consul falsely stated under oath that she intended to join her husband, Jonathan K. Yee, in the United States (if she should gain admittance thereto). In her application she made the statement. Was it a false statement?

We must address ourselves to the meaning of "join her husband." We do not think a fine delineation of what the three words mean is necessary. If on March 5, 1952, she was intending to come to the United States, meet her newly acquired, technical at least, husband, Jonathan Yee, (who in February had preceded her back to San Francisco) and to promptly commence living with him as man and wife, then she intended to join her husband. On the other hand, if on March 5, 1952, the state of mind of Helen was that she had married Jonathan as a matter of convenience to get to the United States and had no intention as of that date of ever cohabiting with Jonathan, we do not think an intent to greet Jonathan cordially at the San Francisco airport and to proceed through other open and empty formalities would absolve her.

In this court, we cannot weigh the evidence. Appellant's counsel earnestly argues that the evidence was insufficient. He and Helen can point to facts such as:

1. There was a marriage, regular in form, of Jonathan and Helen in Hong Kong on November 29, 1951.

2. On the night of March 16, 1952, Jonathan signed the register in an Oakland Hotel "Mr. and Mrs.

Jonathan Yee." And at least Helen immediately occupied the room for which the registration was made. (March 16 was the day Helen arrived in San Francisco from Hong Kong.)

3. On May 31, 1952, Jonathan and Helen went to Reno and again they were participants in a marriage ceremony.

4. In August, 1952, Jonathan and Helen traveled together (with Jonathan's two children born to Jean) to Seattle where they lived together for a substantial portion of one month.[5]

All of the above is consistent with Helen's innocence in saying on March 5, 1952, that she intended to come to the United States to join her husband.

Intent here must be largely circumstantial, but the prosecutor has some pretty good circumstances.

1. The jury might believe that before Jonathan arrived in Hong Kong in October, 1951, Helen had been in correspondence with William Fong and not at all with Jonathan.

2. The jury might believe that Helen overheard Jonathan talking from Hong Kong to San Francisco to William Fong and Jean Jow Yee before the marriage ceremony. From those conversations, if related to the court truthfully, she may have known (if it could be possible she didn't know before) that she

[5]The prosecutor probably argued within proper bounds and with much force that the purpose of the remarriage and the short period of cohabitation of Helen and Jonathan was to excite William Fong to produce some promised consideration.

was destined for William Fong—not Jonathan Yee—and that from her he hoped to have a male heir.

3. The jury may have believed that at no time from November 29, 1951, the date of Helen's ceremonial marriage in Hong Kong, to the day in February, 1952, when Jonathan flew back to San Francisco, did Helen cohabit with Jonathan.

4. The jury may have believed that while Jonathan was in Hong Kong he requested money of William Fong in San Francisco and that Fong sent the money to Helen, not Jonathan, and Helen used it.

There were enough events preceding March 5 to find that on that day Helen did not intend to come to the United States to "join my husband, Jonathan Yee" as she swore she intended to do.

And later events reasonably close in time can send inferences backward to the event which is asserted to be a crime. Of course flight, although there was none here, is the common example. See Wigmore on Evidence, 3rd Ed. § 276.

When Helen reached San Francisco on March 16, 1952, there were a number of events which may have properly influenced the jury.

1. The jury may have thought that it was significant that apparently Helen was not disturbed when Jonathan brought Jean, by now in advanced pregnancy with her second child, to the San Francisco airport to greet her, Helen.

2. The jury may have thought that Helen, leaving the San Francisco airport, rode in a separate car to

the Oakland hotel via a celebration in San Francisco, there at Oakland to have Jonathan register her in and then leave to go back home in San Francisco to cohabit with Jean. The jury may have thought that over this ungroomlike conduct Helen made no outcry. (And it does seem rather clear from the evidence that Helen did have a temper.)

3. The jury may have believed that within a day or two after arriving in San Francisco, Helen was demanding that Gee Kee Yip divorce William Fong so she (Helen) could claim him as her prize.

4. The jury may have thought that Helen after arriving in the United States did demand that William Fong give her some property first before she would marry him and that the idea of demanding it did not originate after March 5, 1952.

There were many things not too remote either way from March 5 from which the jury could conclude that Helen on March 5, intended to come to the United States to "join" William Fong, or just to come to the United States, and not to "join" Jonathan Yee. See Wigmore on Evidence, 3rd Ed. §§ 267, 268.

Then, like flight, the ridiculousness of an alibi, sworn in court, or unsworn and out of court, can give some affirmative inferences. Particularly is this so on the matter of intent which can never be mathematically established. On December 21, 1955, Helen was questioned by immigration officers in San Francisco concerning how she came to the United States. These questions and her answers came into evidence. The degree of improbability of some of the answers

in her "alibi" point to a likelihood that on March 5 she had no intent to come to the United States to "join" Jonathan Yee.

There was ample evidence on the substantive count. Only a portion of it we have detailed. Likewise, the conspiracy, as we have indicated, was amply proved.

On the substantive count we have considered whether we have imposed too strict a meaning on the word "join." We do not think our decision is captious. We think if the jury thought that the game of musical chairs, i.e., the husband swapping, was all a part of a plan in which Helen was a knowing participant and by which she would get into the United States by becoming Jonathan Yee's wife in name only, there is no unfairness in convicting her for saying she intended to "join" her husband.

We conclude the evidence was sufficient to support the verdict and judgment.

Judgment affirmed.

(Endorsed:) Opinion. Filed May 28, 1957.
Paul P. O'Brien, Clerk.

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

CHIN BICK WAH,	*Appellant,*	No. 15,268
UNITED STATES OF AMERICA,	*Appellee.*	

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and is hereby affirmed.

Filed and entered May 28, 1957.

Appendix B

STATUTES INVOLVED.

8 USC 1324. Bringing in and harboring certain aliens; persons liable; authority to arrest.

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to

the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws. June 27, 1952, c. 477, Title II, ch. 8, Sec. 274, 66 Stat. 228."

8 USC 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts.

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than

two years, or by a fine of not more than $1,000 or both. June 27, 1952, c. 477, Title II, ch. 8, Sec. 275, 66 Stat. 229."

18 USC 1001. Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or [illegible]try, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

18 USC 1542. False statement in application and use of passport.

"Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 771."